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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAY E. McELROY, WARDEN,
Petitioner,

v.

M. W. HOLLOWAY,
Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether a state may require a defendant to produce "some evidence" on an issue which relates to justification and mitigation, and is designated as an affirmative defense, without impermissably shifting the burden of proof to the defendant?

2.

Whether the decision of the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), should be applied retroactively?

3.

Whether under the applicable standard for review by federal courts of state court convictions in applications for federal habeas corpus relief, the district court improperly found there to be insufficient evidence to support Respondent's conviction for voluntary manslaughter?

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OPINIONS BELOW

The published opinion of the Court of Appeals for the Fifth Circuit is reported as *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980). The order granting federal habeas corpus relief entered by the United States District Court for the Middle District of Georgia is reported as *Holloway v. McElroy*, 474 F.Supp. 1363 (M.D. Ga. 1979).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 11, 1980. See *Holloway*

v. McElroy, 632 F.2d 605 (5th Cir. 1980). A timely petition for rehearing en banc was denied on January 12, 1981 and this petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statutory provisions:

Ga. Code Ann. § 26-901:

> "The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed . . ."

Ga. Code Ann. § 26-902:

> "(a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such others' imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony.
>
> (b) A person is not justified in using force under the circumstances specified in (a) of this section if he: (1) initially provokes the use of force against himself with the attempt to use such force as an excuse to inflict bodily harm upon the assailant; or (2) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony;

or (3) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force."

Ga. Code Ann. § 26-907:

"A defense based upon any of the provisions of this Chapter is an affirmative defense."

Ga. Code Ann. § 26-1102:

"A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder. A person convicted of voluntary manslaughter shall be punished by imprisonment for not less than one nor more than twenty years."

STATEMENT OF THE CASE

Respondent M. W. Holloway, was indicted for the murder of Joe Crumbley in the Superior Court of Crisp County, Georgia. However, following a jury trial, during which Respondent asserted that he had acted in self-defense, Respondent was found guilty of voluntary manslaughter.

The Respondent, M. W. Holloway, was granted a writ of habeas corpus in the United States District Court for

the Middle District of Georgia, Americus Division, wherein, the district court set aside Respondent's 1975 conviction for voluntary manslaughter imposed in the Superior Court of Crisp County, Georgia, following a jury trial held on May 1, 1975. Respondent had had his conviction affirmed on direct appeal in the Georgia courts as well as having his state habeas corpus petition found to be without merit in the state courts.

The Petitioner appealed the district court's decision to the Court of Appeals for the Fifth Circuit. On December 11, 1980, the Court of Appeals for the Fifth Circuit affirmed that portion of the district court's decision relating to the trial court's allocation of the burden of persuasion on the issue of self-defense and that portion of the district court's decision to grant habeas corpus relief, based on its finding that there was insufficient evidence to support the Respondent's voluntary manslaughter conviction. *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980).

Petitioner filed a petition for rehearing and petition for rehearing en banc in the Court of Appeals for the Fifth Circuit, but said petition was denied by that court on January 12, 1981.

By means of this petition for writ of certiorari, Petitioner Clay E. McElroy, Warden, by and through counsel, Attorney General of Georgia, appeals the decision of the Court of Appeals for the Fifth Circuit which held the following:

(1) that the trial court's instruction concerning self-defense operated to place the burden of persuasion on the Respondent, thereby violating his constitutional rights;

(2) that this Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) should be applied retroactively; and

(3) That the evidence was insufficient to support Respondent's state court conviction for voluntary manslaughter.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT UNDER GEORGIA LAW, TO REQUIRE A DEFENDANT TO PRODUCE SOME EVIDENCE OF THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE, REQUIRED RESPONDENT TO CARRY THE BURDEN OF PERSUASION ON AN ELEMENT OF THE OFFENSE OF VOLUNTARY MANSLAUGHTER.

The district court concluded that the following instruction to the jury at the Respondent's trial, operated to place the burden of persuasion on the Respondent, thereby violating his due process rights:

> "I charge you further that the law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation, of justification, of mitigation, or excuse and the burden is upon the slayer whenever an intentional homicide has been proved to make out such circumstances to the satisfaction of the Jury unless they appear from the evidence produced against him. If, however, the proof if there be any, that shows the homicide itself discloses that the homicide was done without malice, this presumption that the homicide is malicious does not exist, but if the accompanying proof, if there be any, does not disclose that the killing was done without malice, then it is incumbent upon the slayer to show that it was done without malice. (R. 65)."[1]

---

[1] The district court concluded that this instruction concerning self-defense was improper, because it shifted the burden of proof to the Respondent.

Petitioner contends that instructing the jury to the effect that the Respondent was required to produce "some evidence" on the issue of the affirmative defense of self-defense, once the state has shown the homicide to be intentional, did not violate Respondent's constitutional rights.

In *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), the Court of Appeals for the Fifth Circuit concluded, after having traced the decisions of this Court in *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975) and *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319 (1977), that under Georgia law, to require a defendant to produce some evidence of the affirmative defense of self-defense, requires a defendant to carry the burden of persuasion on an element of the offense of voluntary manslaughter, as it exists under Georgia law, i.e., unlawfulness.

This conclusion and the reasoning upon which it was based, ignores the specific holdings of this Court in *Mullaney v. Wilbur*, *supra*, and *Patterson v. New York*, *supra*. In *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), this Court stated unequivocally that state courts are the ultimate expositors of state law and further stated that federal courts are bound by state court constructions of state law, absent extreme circumstances.

This Court noted in *Mullaney v. Wilbur*, *supra*, that states may require the defendant to produce "some evidence" to put the mitigating circumstances in issue. *Id.* at 701, n. 28. This is exactly what the State of Georgia has done by specifically designating "self-defense" as an affirmative defense. See Ga. Code Ann. § 26-902. The Georgia courts have reiterated that self-defense is an affirmative defense in several decisions including *State v.*

Moore, 237 Ga. 269 (1976), and *Bradham v. State*, 148 Ga. App. 89 (1978) (affirmed as to self-defense being an affirmative defense, but reversed on other grounds), 243 Ga. 638 (1979); *Flury v. State*, 237 Ga. 273 (1976); *Hewell v. State*, 232 Ga. 175 (1974). Therefore, under Georgia law, a defendant is required to come forward with evidence to raise the issue of self-defense.

This requirement that a defendant excuse a homicide by coming forth with an affirmative defense was specifically held not to be violative of a defendant's constitutional rights in *Patterson v. New York*, 432 U.S. 197 (1977). In the instant case, all that was required was that once the homicide had been shown to be intentional beyond a reasonable doubt, that the Respondent show, if not already shown from the circumstances surrounding the homicide, evidence of justification or mitigation. To require an accused person to prove facts that may relieve him or her of criminal culpability, or lessen the degree of culpability, after the prosecution has proven certain elements beyond a reasonable doubt that may establish an accused's guilt, is not unconstitutional.

As the Court of Appeals for the Fifth Circuit stated in *United States v. Parr*, 516 F.2d 458, 466 (5th Cir. 1975):

> "In a criminal case, the burden of proof never shifts to the defendant. A defense, therefore, that relates to an element of the crime *and is not offered in mitigation or justification for the crime, is not an affirmative defense, and the prosecution must disprove it beyond a reasonable doubt.* (cite omitted). This does not mean that the government must anticipate and disprove every conceivable line of defense in its case in chief." (emphasis supplied).

Essentially, if the conclusion of the Court of Appeals for the Fifth Circuit were allowed to stand, the State of

Georgia would have to negate the element of self-defense, in proving the elements of the crime of voluntary manslaughter.

The trial court's instructions in this case, clearly place the burden of proof upon the state, and even when an accused puts forth evidence of self-defense, the burden is upon the state to prove beyond a reasonable doubt that there was no excuse, justification or mitigation, since the state still has to show unlawfulness, even though an accused puts forth evidence of self-defense. Therefore, the state is still not relieved of the burden of proving unlawfulness.

Petitioner asserts that this requirement of producing some evidence of an affirmative defense is within the constitutional parameters of *Patterson v. New York*, *supra*, and presents no "extreme circumstances" under *Mullaney v. Wilbur*, *supra*, which would require the federal courts to interfere with the state's construction and interpretation of its own statutes. Therefore, Petitioner respectfully requests that this Court should grant a writ of certiorari to consider the holding of the Court of Appeals for the Fifth Circuit on this issue.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IMPROPERLY DETERMINED THAT THIS COURT'S DECISION IN *JACKSON V. VIRGINIA*, 443 U.S. 307, 99 S.Ct. 2781 (1979) SHOULD BE APPLIED RETROACTIVELY.

In the decision of the Court of Appeals for the Fifth Circuit in *Holloway v. McElroy*, 632 F.2d 605 (1980), the court held that the decision of this Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), setting a new standard for reviewing the sufficiency of evidence

supporting state court convictions, should be applied retroactively. The Court of Appeals noted that the question of the retroactivity of *Jackson v. Virginia, supra,* had never been directly addressed by the Court of Appeals for the Fifth Circuit, but instead that the Court of Appeals for the Fifth Circuit had held in several decisions that the evidence would have been sufficient to support the verdict if *Jackson v. Virginia, supra,* were to be applied retroactively. *See e.g., Pate v. Wainwright,* 607 F.2d 669, 670 (5th Cir. 1979).

The Court of Appeals for the Fifth Circuit even recognized that in a previous decision by that court the Court of Appeals had expressly declined to decide the issue of retroactivity by stating, "we therefore expressly decline to decide that issue to any extent whatever, *fraught as it is with obvious and disastrous practical consequences for our docket should any substantial number of the thousands of state prisoners confined within our circuit now petition for such review.*" *Sims v. Hopper,* 603 F.2d 581, 582 (5th Cir. 1979).

In making its decision that *Jackson v. Virginia, supra,* should be held to have retroactive effect, the Court of Appeals for the Fifth Circuit noted that research had not revealed any case from any other circuit in which the question of the retroactivity of *Jackson v. Virginia* had even been mentioned. Therefore, this question of first impression is clearly one that should properly be considered by this Court by means of granting a writ of certiorari.

This is especially true because the implications of applying the *Jackson* standard cannot be stated strongly enough. This impact was recognized by the concurring

opinion written by Mr. Justice Stevens in which the Chief Justice and Mr. Justice Renhquist joined in the decision of *Jackson v. Virginia, supra.* Among other effects of even the prospective application of the new standard, Mr. Justice Stevens noted the potential effect on federal judges by stating th following: "The new standard will invite an unknown number of state prisoners to make sufficiency challenges that they would not have made under the old rule." *Jackson v. Virginia, supra,* at 337. It need not be stressed that retrospective application would have an even greater impact upon the federal judiciary.

The Court of Appeals for the Fifth Circuit cited two decisions of this Court, i.e., *Pilon v. Bordenkircher,* 444 U.S. 1, 100 S.Ct. 7 (1979) and *Moore v. Duckworth,* 443 U.S. 713, 99 S.Ct. 3088 (1979), as indicating that *Jackson v. Virginia* should be applied retroactively. In *Pilon v. Bordenkircher, supra,* this Court vacated and remanded the case for consideration under the standard of *Jackson v. Virginia, supra,* but did not directly hold that it was "retroactive." In *Moore v. Duckworth, supra,* although this Court held that the circuit court erred in using the former standard, they did not remand it for reconsideration in light of *Jackson v. Virginia, supra,* because the court stated that it was clear from the record that there was sufficient evidence even under the standard of *Jackson v. Virginia.* Therefore, this Court has never considered whether *Jackson v. Virginia* should be given retroactive effect in a case in which ostensibly the application of a different standard might support a different finding as to the sufficiency of the evidence, nor has it reviewed a case in which *Jackson v. Virginia* has already been given retroactive application by a circuit court. Therefore, a writ of certiorari should be granted under the

particular circumstances of this case.

This is especially true in light of the recent decision of this Court in *Brown v. Louisiana*, ____ U.S. ____, 100 S.Ct. 2214 (1980) (plurality opinion), in which this Court considered whether the principle that conviction of a non-petty criminal offense in a state court by a nonunanimous six person jury, violates an accused's right to trial by jury, is a principle which should be applied retroactively. In finding that the principle should be retroactive, the court found that retroactive application would not have a devastating impact on the administration of criminal law. This Court should consider, under the circumstances of this case, as it considered in *Brown v. Louisiana, supra*, whether retroactive application of *Jackson v. Virginia, supra*, would or would not have a devastating impact on the administration of criminal law. Therefore, a writ of certiorari should be granted.

III. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IMPROPERLY FOUND, AFTER REVIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THAT NO REASONABLE FACT FINDER COULD HAVE FOUND THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

The Court of Appeals for the Fifth Circuit stated that under the *Jackson v. Virginia* standard that it was bound to consider all the evidence in the light most favorable to the prosecution. The court then stated its conclusion that having viewed the evidence adduced at Respondent's trial in this light, that no reasonable fact finder could have found the absence of self-defense beyond a reasonable

doubt. The Court of Appeals concluded that there was overwhelming evidence supporting Respondent's contention of self-defense and that circumstantial evidence cited by the state as supporting a finding of the absence of self-defense was insufficient.

Petitioner contends that the jury, weighing the state's evidence against the evidence of the Respondent, and having been presented with inconsistencies in Respondent's testimony and evidence contradicting his version of the incident, would clearly have authorized the jury to find that although the Respondent did not commit murder, he had the requisite intent, coupled with "heat of passion," to authorize a finding of guilt of voluntary manslaughter.

In making its decision that the evidence was insufficient to support Respondent's voluntary manslaughter conviction, the Court of Appeals for the Fifth Circuit noted in footnote 56 that, "because the Georgia Court of Appeals did not have the benefit of *Jackson* when it acted on Holloway's direct appeal, its finding cannot even be 'entitled to great weight.' " This conclusion by the Court of Appeals for the Fifth Circuit is clearly improper as a review of Section 5 of the Georgia Court of Appeals decision in *Holloway v. State*, 137 Ga. App. 124, 126 (1975), reveals that the Court of Appeals of Georgia set out the circumstances surrounding the killing of the victim in a way most favorable to the Respondent and concluded that there was "ample evidence" to warrant a verdict of guilty of manslaughter. Therefore, the Court of Appeals did not use the former "any evidence" standard in finding that there was sufficient evidence to support Respondent's conviction. The Court of Appeals of Georgia made the following findings in regard to the sufficiency of the evidence at Respondent's trial:

"The transcript shows that defendant Holloway and Crumbley, who was shot and killed by Holloway, were in Holloway's yard and engaged in an argument and altercation. Defendent contended the argument revolved around an accusation by Crumbley that Holloway had tried to kill him at a fish pond some time earlier, which Holloway stoutly denied. Defendant and Crumbley began fighting; defendant disengaged himself and went into his house, and Crumbley also came into the house with a knife in his hands, and it was at this time that defendant grabbed his gun and started shooting; and one of the shots pierced a vital spot in Crumbley's body and killed him. There were many discrepancies in defendant's story, but we are setting it forth above in the way that is most favorable to defendant's contentions, despite the discrepancies.

Defendant contended he shot from a downward position upward, but expert testimony was introduced to show that the trajectory of the bullet in Crumbley's body ranged downward, thus indicating that defendant Holloway could have been standing over Crumbley at the time of the fatal shot. Defendant's first story was that Crumbley took his jacket off right after he got out of the truck while in the yard. When confronted with the fact that the jacket had a bullet hole in it, defendant changed his story and claimed that defendant himself took that jacket off Crumbley after Crumbley had been shot. He gave no reason for such action except that he wanted to learn how badly Crumbley was shot.

The evidence amply warranted a verdict of guilty of manslaughter; and further authorized the jury to disbelieve defendant's testimony because of being contradicted by prior contradictory statements about when and who took the jacket off the deceased and as to whether the shots ranged downward or upward. Code § 38-1803. See also *Nolen v. State*, 124 Ga. App. 593, 594, 597 (184 S.E.2d 674)."

137 Ga. App. at 126.

It is the Petitioner's contention that the Court of Appeals of Georgia properly found under a standard as "liberal" as the new standard of *Jackson v. Virginia*, that Respondent's conviction was supported by the evidence and the Court of Appeals for the Fifth Circuit erred in disregarding the decision of that court.

CONCLUSION

For all of the above and foregoing reasons, a petition for a writ of certiorari should be granted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Petition for Writ of Certiorari upon the Respondent by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Respondent as follows:

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This 16th day of March, 1981.

Susan V. Boleyn

SUSAN V. BOLEYN